Filed 1/22/19 P. v. Singh CA1/4
Reposted to provide correct judicial panel information

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JASJIT SINGH, Defendant and Appellant.	A149670 (City & County of San Francisco Super. Ct. Nos. SCN209346, 2288792)

Defendant Jasjit Singh was convicted by jury of forcible rape, rape of an intoxicated person, lewd conduct with a child under 16 at least 10 years younger, and multiple other sexual assault charges. The court sentenced him to 14 years in state prison. Defendant contends that the court abused its discretion in finding just cause to dismiss Juror No. 8 during deliberations and that the juror's dismissal violated his state and federal constitutional rights to due process, a fair and impartial jury, and a unanimous verdict. Defendant also contends that the court erred prejudicially when it denied defendant's motion for a new trial based on newly discovered evidence.

We disagree and shall affirm the trial court's rulings.

BACKGROUND

The Prosecution's Case

On April 25, 2006, R. and her best friend Natalie agreed to meet defendant for a night out in San Francisco. Earlier that evening, Natalie had received an instant message from a person named Jay who proposed that they "meet up." Natalie had never met Jay

before. Natalie first spoke with Jay on the phone and later included her friend R. on the call.[1] During the call, defendant told the girls he was 19 years old when he was actually 37 years old, attended San Francisco State University, was of Persian and Indian descent, and that he had a fake identification. Jay, R., and Natalie engaged in a three way call for about an hour. Natalie told Jay that she was 16 and R. told Jay that she was 15 years old.[2] Jay asked the girls a lot of questions including what kind of sexual practices they preferred and the type of alcohol they liked to drink. Eventually, the three of them agreed that they would go into the city to hang out for the evening. Jay volunteered to bring the alcohol.

Jay first picked up R. at her house in San Francisco. When she got into his car, R. thought Jay looked older than 19; she jokingly told him he looked around 30. Jay showed R. the alcohol he brought, a bottle of Jägermeister and a bottle of Bacardi 151. While on route to Natalie's house in Corte Madera, R. tried the Bacardi 151 but she did not like it. She drank the Jägermeister straight out of the bottle. While she could not remember exactly how much she drank, she did remember being somewhat intoxicated. R. had not eaten anything before meeting Jay.

By the time they got to Natalie's house, it was 1:00 a.m. Natalie asked them to meet her at the bottom of the hill by her house because she didn't want her mother to know she was sneaking out of the house. Natalie got into the back seat of Jay's car and took a sip of Jägermeister while R. continued to drink Jägermeister. Although she could not clearly remember, R. thought that she was intoxicated by the time she and Jay started kissing in the car.

By the time they got to Louis's house, Natalie observed that R. was intoxicated describing her demeanor as loud, obnoxious, and violent. Natalie decided she wanted to stay with Louis at his house. When R. asked if she could go inside too, Louis told her no because she was drunk and loud and he did not want to wake his parents. At this point R.

[1] R. later identified defendant as "Jay," the man who assaulted her, from a photographic lineup shown to her by police.

[2] R. was in fact 15 years old at the time.

became angry. She believed Natalie was deserting her. R. also did not have her cell phone with her. She got physical with Natalie and slapped her. Natalie left her cell phone with R. and went inside Louis's house, leaving R. behind.

When R. got back into Jay's car, she told him to take her home but instead he took her to an apartment. R. ended up in a bedroom where she sat down because she felt sick. At trial, R. could recall very little of the rest of that night. Portions of the preliminary hearing transcript were admitted at trial during R.'s testimony because she was unable to remember certain things. She remembered the room was spinning and that Jay began to touch her first on her back. She told Jay she wanted to go home. She testified she performed oral sex on Jay and that she "didn't like it." She told him "no" during this time. At the preliminary hearing, R. testified that Jay grabbed her head and put his penis into her mouth while she was crying and gagging. She remembered saying she wanted to go home. She also remembered telling Jay "no" either before or when she was orally copulating him but he did not remove his penis from her mouth. While this was going on, she heard Natalie's phone ringing several times. While still at the apartment, R. also spoke on the phone with her boyfriend Eddy after having sex with Jay. She did not tell Eddy that she had been raped because it was embarrassing.

When she got home, R. recalled that she threw up and was "very, very drunk." She also got into an argument with her grandmother about coming home late and being intoxicated. When her grandmother found out what happened to her in Jay's apartment, she called the police to report the rape. R. did not want her to call the police because she was scared and embarrassed. The officer who responded to the call at around 3:00 a.m. reported that R.'s "speech was slurred, her eyelids were dropping, and . . . she appeared intoxicated." R. was transported to the hospital.

At the hospital, Nurse Mary Slaughter examined R. and observed that she was "very intoxicated." Although she was able to walk, R. was "staggering." In response to the question as to whether force had been used on her, R. said "yes" and that the encounter was not consensual. R. responded "yes" when asked whether she experienced penile-vaginal and penile-anal penetration, digital-vaginal and digital-anal penetration,

and penile-oral penetration. R. also responded "yes" when asked whether she experienced pain associated with anal penetration. In her report, Nurse Slaughter noted, "when the minor said no to sexual contact, 'J' insisted/encouraged a very drunk youth." Pediatrician Chris Stewart also examined R. While he did not note any unusual findings, marks or injuries as to his perivaginal exam, he testified this was not unusual after a sexual assault. He did find an abrasion in R.'s perianal area consistent with R.'s report that she had been penetrated there by a finger and a penis. He noted in his report "abnormal anal-genital exam."

During cross-examination, R. acknowledged that in 2006 she used the name "forbidden xtasy" on her Myspace page, and wrote that she liked to "hang out with friends," "go to parties," "get drunk with my bitch Natalie," "get high as fuck," "party with some hot ass guys we don't know," and "[drink] Jager and Jack Daniels for life." She admitted that she liked to "binge drink" and had been doing so since age 13. After her first call with Jay and Natalie, she had another long private conversation with just him over the phone before he picked her up. She did tell Jay what she liked to do in bed sexually.

Several criminalists from the San Francisco Police Department testified at trial. During the investigation, swabs were taken from R.'s vaginal and rectal areas and compared with a reference sample taken from defendant. Defendant was identified as a possible contributor or possible source of DNA found on the vaginal swab. Criminalist Bonnie Cheng testified that the probability for how commonly this profile would be found was one in 525 billion for the general Asian population. Defendant was also included as a possible major contributor to the DNA and sperm fraction found on the rectal swab.

Alan Wu testified as an expert in "clinical chemistry and toxicology." He described how long it takes for someone who has consumed alcohol to start experiencing its effects. He estimated that a five feet five inches tall female who weighs about 150 pounds would have an estimated .20 percent blood alcohol content if she drank about four shots of Jägermeister and one shot of Bacardi 151 all within a short time, on an

empty stomach. A blood alcohol level of .08 is consistent with driving under the influence of alcohol. A blood alcohol level of .20 could result in confusion, disorientation, slurring of speech, and reduced motor function.

On July 2, 2013, the day after R. began her testimony, defendant did not return to court for his jury trial which continued in his absence. A bench warrant was issued for his arrest. Defendant remained absent for the rest of the jury trial. Evidence was later presented to the jury that the defendant rented a car in Seattle in the evening on July 1, 2013, and returned the car to the same location on July 4, 2013. The court later determined that defendant had fled to Canada.

The Defense

When interviewed by defense private investigator Zachary Fechleimer, Louis told him that he observed R. on April 26, 2006, for about 30 seconds but in that short time although she appeared to be drunk, "she was not falling over and [was] still in control of herself."

Defendant's private investigator Leslie Harrison testified that R. appeared "older than her age." R. told her that the three-way conversation she and Natalie had with Jay "was explicitly sexual" and that she knew Jay wanted to be sexual with her. R. could not recall whether she told Jay "she was not interested." R. told her "at minimum she drank half the bottle of Jägermeister, possibly more" and that "she was fearful after Natalie left because [Jay] kept driving around. She didn't know where she was, and she felt extremely intoxicated." R. also told Harrison that when defendant put his penis in her mouth, she was choking and told him "no."

On September 23, 2011, count thirteen was dismissed. Testimony in the jury trial began on June 26, 2013. On July 2, 2013, the court issued a bench warrant for defendant's arrest when he did not appear for trial. Over defense objection, the trial continued in his absence.[3] After the close of evidence, the jury began deliberating on

[3] Defendant was later arrested on the bench warrant by the Canadian authorities. He spent some time in custody in Canada and was ultimately returned to the United States where he first appeared in court on January 14, 2016.

July 11, 2013. On July 15, 2013, after a juror was discharged for medical reasons, an alternate juror was chosen to replace the juror and the jury began deliberating anew. On July 17, 2013, after two more days of deliberation, the court excused Juror No. 8 and an alternate juror was chosen to replace her. On the same day, the court also excused Juror No. 11 and an alternate juror was seated in his place.[4]

On July 18, 2013, the jury found defendant guilty as to counts one through six and counts eight through eleven and not guilty as to counts seven and twelve. On October 7, 2016, the court denied defendant's motion for a new trial, denied probation, and sentenced defendant to state prison for a total term of 14 years.

Defendant filed a timely notice of appeal on October 14, 2016.

DISCUSSION

I. Juror Misconduct: Issues Presented and Standards of Review

Defendant contends that the trial court abused its discretion by dismissing a juror who was a holdout for acquittal during deliberations without good cause. Pursuant to section 1089 the court, upon "good cause shown," may discharge any juror "found to be unable to perform his or her duty" at any time during the trial. A trial court's decision to remove a juror is reviewed under an abuse of discretion standard and will be upheld only if that juror's disqualification appears on the record as a demonstrable reality. (*People v. Wilson* (2008) 43 Cal.4th 1, 26, abrogated on other ground as noted in *People v. Johnson* (Dec. 27, 2018) __ Cal.5th __ [2018 Cal. Lexis 9911].) We disagree and find no abuse of discretion by the trial judge in excusing the juror.

[4] After the court removed Juror No. 8 from the panel, defendant's trial counsel made a motion to have Juror No. 11 excused because this juror had asked the foreperson to contact the court to raise questions concerning Juror No. 8. This discussion took place outside the presence of the other jurors. The court granted the motion, finding that Juror No. 11 did violate the court's instruction not to discuss the case outside of the jury room. It also appeared to the court that this juror wanted Juror No. 8 removed from the jury because she was a hold-out juror, which was improper.

A. Demonstrable Reality Standard

A defendant has a constitutional right to a unanimous verdict by a fair and impartial jury. (*People v. Engelman* (2002) 28 Cal.4th 436, 442.) The removal of a juror is therefore a serious matter. "While a trial court has broad discretion to remove a juror for cause, it should exercise that discretion with great care." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052). As our colleagues in Division Three have stated, great caution is required in dismissing a sitting juror, "especially where, as here, a holdout juror is excused. 'A court's intervention may upset the delicate balance of deliberations. The requirement of a unanimous criminal verdict is an important safeguard, long recognized in American jurisprudence.' " (*People v. Harrison* (2013) 213 Cal.App.4th 1373, 1382.)

This higher standard reflects the appellate court's "obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." (*People v. Barnwell, supra,* 41 Cal.4th at p. 1052.) "The demonstrable reality test entails a more comprehensive and less deferential review [than the substantial evidence test]. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Id.* at pp. 1052-1053.) The appellate court considers the evidence on which the trial court relied and the trial court's record of reasons given; deference is given to the trial court's credibility determinations. (*Id.* at p. 1053.)

B. Relevant Proceedings

1. Juror No. 8's Initial Communication with the Court

This jury first began deliberating on July 11, 2013. On July 15, 2013, after a juror was discharged for medical reasons, an alternate juror was chosen to replace the juror and the jury began deliberating anew. On the morning of July 17, 2013, after two full days of deliberation, the trial judge advised counsel that she had been approached by Juror No. 8

at the end of the previous day.[5] Juror No. 8 was sitting outside on the bench and appeared to be writing quite a bit on some kind of notebook that was not the court's notebook.[6] Juror No. 8 immediately stopped the judge and insisted on talking with her. The judge told Juror No. 8 that she could not talk to her that evening but to return to court the next morning.

The court advised the parties that Juror No. 8 had left a voice mail message for the court at 7:00 a.m. indicating that she wanted to speak to the Judge and she would be in court in the morning for that purpose. At 9:27 a.m., in the presence of counsel, the court brought Juror No. 8 into the courtroom and admonished her not to share the content of the jury's deliberations with the court.

During her colloquy with the court, Juror No. 8 explained to the court that she felt there was a rush to judgment by the jury and that she was in the minority. She stated it was hard to raise difficult issues because she was outnumbered. Juror No. 8 reported that whenever she tried to express some analytical thinking, two of the male jurors "just shut me down." Other members of the jury were also not willing to hear her out. Juror No. 8 acknowledged that she had been accused of being argumentative by some of the jurors but perceived that this was because she had a stronger voice than a young woman, had more life experience, and was not afraid of the men. She complained that whenever she raises a point, the other jurors tell her they have decided that already. Juror No. 8 complained of feeling ostracized. She stated "I'm going to vote my way whether they like it or not."

After more questions from the court, Juror No. 8 explained "I try to raise issues of reasonable doubt" but that it is "almost impossible." When asked if she was willing to continue the deliberating with the other jurors, Juror No. 8's immediate response was "This is so upsetting." The court then took a short break to allow Juror No. 8 to compose

[5] In their discussions with the court, the parties and the court often referred to each juror by their jury identification number or alternatively by their seat number. Here we shall refer to each juror by their seat number.

[6] Juror No. 8 was also identified by juror number 3398070.

herself, offering her water and Kleenex. When Juror No. 8 returned, the court asked her if she would be willing to continue with the deliberation process in good faith. Juror No. 8 responded by saying that at her age of 62 she has a lot of experience with living and doesn't think the jurors recognize certain things. She believed that all the other jurors were against her. However, Juror No. 8 insisted "I will do what I have to do. I've always done what I have to do."

When the court asked her again if she would be willing to continue in the deliberation process and engage with the other jurors, Juror No. 8 said that she didn't care what the other jurors thought, she would concede a point if she thought it was valid. She thought that she did listen and did engage in the deliberation process. When the court thanked Juror No. 8 and advised her that she would be escorted back to the jury room, she told the court she needed some time to compose herself in the bathroom.

After Juror No. 8 was escorted from the courtroom at 9:43 a.m., the court engaged in further discussions with the parties as to how to proceed given Juror No. 8's expressed concerns. Ultimately, the court decided not to do anything further and sent all 12 jurors back in to deliberate.

2. The Foreperson's Communication with the Court

At 11:10 a.m., the court received a note from Juror No. 7, the foreperson of the jury, with a request to meet in private concerning one of the jurors. After being admonished not to discuss the substance of the jury's deliberations, Juror No. 7 advised the court that two of the other jurors reported that one juror had been taking notes, removing them at the end of the day, and bringing them back the next morning. Multiple people had expressed concerns about this juror. Some of the jurors felt this juror was fundamentally mentally unstable. He agreed with their opinion, stating that the juror appears "irrational and impervious to logical deduction which has made deliberations excruciating." He described this juror as "one of the key holdouts on multiple charges, but – is incapable of deliberating." He added, "She is just exasperating."

When asked to elaborate further, Juror No. 7 advised that he believed Juror No. 8 to be unstable because she mumbles under her breath and in multiple scenarios, she is

only capable of responding to yes or no questions. He described the juror as unable to logically deduce from "point A to point B". She brings up past history that is not at all related to the point. When asked whether the juror was listening to the other jurors and expressing responses to other people's comments during the deliberations, Juror No. 7 stated that sometimes Juror No. 8 was responsive and willing to engage. Other times, she would say "I'm not going to talk." Although somewhat hesitant to share this information, Juror No. 7 also described how Juror No. 8 lacked basic etiquette. He stated that "she'll unbuckle her belt before she goes to use the bathroom and comes out of the bathroom with her belt unbuckled." "[S]he commonly puts her hands into her pants – underneath her pants." This has happened while she is sitting in the jury room with the other jurors there. When asked whether he thought this juror was capable of deliberating, Juror No. 7 said "no." He also believed the majority of jurors shared his opinion.

3. The Court's Voir Dire of the Jurors

After discussing Juror No. 7's comments with the parties, the court questioned the rest of the jurors on the issues raised by the foreperson. All 10 jurors were admonished not to discuss the substance of the deliberations in any way. When asked questions concerning whether there was any one juror who appeared to be incapable or unwilling to deliberate, all 10 jurors immediately identified Juror No. 8. Relevant comments by each of the 10 jurors are set forth below.

Juror No. 1:

Juror No. 1 expressed her concern that Juror No. 8 was not a logical thinker. Juror No. 8 will agree with a point and then four hours later has no idea that she agreed to it. She also brings in irrelevant topics about history or her personal life. When asked about her conduct, Juror No. 1 replied that Juror No. 8 either monopolizes the conversation or gets mad if people interrupt her. When that happens, she will sulk and shut down and refuse to take part in any conversation for hours. Juror No. 8 frequently gets up and abruptly leaves for bathroom breaks in the middle of a conversation. Juror No. 8 was "very emotional" and seems "overwhelmed." As an example, Juror No. 1 stated, "You might say a . . . sentence, you know, statement to her, and she is overwhelmed. She wants

you to break it down basically a word at a time. . . . You break it down very slowly, and you're still not able to get through to her." When asked about whether this juror had seen anything with regard to Juror No. 8 taking notes, Juror No. 1 advised that he saw her use a yellow legal pad in the room.

Juror No. 2:

Juror No. 2 expressed a concern that Juror No. 8 will sometimes "flip flop." She will agree with everybody but later on she will change her mind. He felt she put too much of her own personal biases or experiences into the deliberations, instead of focusing on the facts. This juror acknowledged that Juror No. 8 listens to the other jurors most of the time but she becomes very defensive. Juror No. 8 has accused them of cutting her off and not listening to her. Juror No. 8 has difficulty thinking when three or four persons are talking with her. This juror observed she always wants to have time to review her notes. Juror No. 2 saw her taking notes on a separate pad. This juror did not notice anything about her physical conduct in the jury room that caused him concern.

Juror No. 3:

Juror No. 3 reported that during deliberations Juror No. 8 had been taking notes on a legal pad and had removed the notes from the jury room during break and at the end of the day. This juror also observed Juror No. 8 tearing off pieces of paper from the legal pad and putting it in her briefcase. Juror No. 3 had spoken to Juror No. 8 that morning and confronted her about the notes. Juror No. 8 had been crying and was already emotional that morning. When asked why she was taking home her notes, Juror No. 8 said that "she needed to take that – her notepad out for clarification during our discussions." Juror No. 3 reported Juror No. 8's misconduct to the foreperson of the jury. When asked about Juror No. 8's participation in the deliberation room, Juror No. 3 described Juror No. 8 as angry and confrontational, and stated that she often interrupted other people and mumbled under her breath a lot of times. Juror No. 3 noted that Juror No. 8 reacts "in a very angry manner."

Juror No. 4:

Juror No. 4 expressed concern that Juror No. 8 often brings up personal experiences that have nothing to do with the issues. She will backtrack on her decisions, saying one thing one minute and then stating she still needs time to think about it. She uses her personal experience comparing what happened in the 1960's to how people are now. This juror explained that Juror No. 8 will often shut down and believed she was not a participating juror. When she shuts down, Juror No. 8 crosses her arms and says she doesn't want to say anything. Juror No. 4 also observed Juror No. 8 use a separate notepad from the one the court provided. Juror No. 4 has seen her pull out folded papers with writing on it from the notepad and use those notes during deliberations.

Juror No. 5:

Juror No. 5 expressed the concern that Juror No. 8 was taking notes on a different legal pad than the court notebook and that she was taking these notes home to review. Juror No. 5 noticed that Juror No. 8 constantly writes on the yellow legal pad, then tear the papers out, folds them in half, and sticks them in her briefcase. When they leave the jury room, the notes are gone. Juror No. 5 brought this to the attention of the foreperson. In response to the court's questions about the deliberation process, Juror No. 5 stated that Juror No. 8 often references many things from her past. Juror No. 8 often feels like they are not listening to her, but she usually has the floor "more than 60 percent of the time when we are trying to understand where she stands on things." Juror No. 8 gets very defensive if they try to tell her to stay on point. Juror No. 5 reported that Juror No. 8 mumbles to herself which is very distracting. Juror No. 5 expressed frustration with Juror No. 8, adding that this "slow[s] down the process and I don't care how long it takes. If it takes us a month, I'll be here. I don't care, but if we are not getting anywhere because someone is not listening or not willing to listen to us, we are not going to get anywhere. We'll be here forever."

Juror No. 6:

Juror No. 6 stated that Juror No. 8 seems to have a lot of trouble processing what the rest of the jurors are talking about. The rest of the jurors are having very rational

discussions. Juror No. 6 stated that as soon as anybody starts to talk with her, Juror No. 8 starts talking over that person. If anyone interjects in a reasonable way while she is talking, Juror No. 8 will ask them not to interrupt her. She will close her eyes and won't make eye contact with whoever is engaging her in the discussion. Juror No. 6 felt this was very "child-like behavior." When asked about Juror No. 8's personal conduct, Juror No. 6 recounted that Juror No. 8 made frequent trips to the restroom in the middle of a conversation with the other jurors. This has happened several times. Juror No. 6 also noted that Juror No. 8 takes notes on a separate yellow notepad and observed her writing on that same notepad in the hallway at the break. This juror also described how Juror No. 8 takes things personally but doesn't believe that she's taking things personally. "She seems to get defensive but then denies being defensive."

Juror No. 9:

Juror No. 9 thought that Juror No. 8 had difficulties concentrating on what the other jurors were talking about. Juror No. 9 stated that Juror No. 8 spends too much time talking and doesn't let other people talk. While Juror No. 8 listens to others, "she listen[s], but sometimes with difficulty." When asked to explain what she meant, Juror No. 8 said "sometimes she gets in a position [that is] very childish." Juror No. 9 reported that Juror No. 8 takes notes on a yellow pad and the court notepad. She always has her notes with her and takes the notes with her when she leaves the jury room. Juror No. 9 thought that Juror No. 8 was "holding us." She stated "because we try to deliberate, and she go[es] to another point. And she go[es] around . . . so like we waste a lot of time on that."

Juror No. 10:

Juror No. 10 stated that Juror No. 8 does not seem to be able to process information very fully. When the other jurors try to break a particular charge down into its components and "be as simple as we can" Juror No. 8 will agree to some of them and then she stops and can't make a decision. She will ask for more time to think about it and then wants to take a break. When they are going back and forth with her, she will abruptly get up and go to the bathroom. When this happens, Juror No. 8 will be gone for

a long time before she comes back. This happened two or three times that morning and three or four times the day before. When the other jurors try to get her back on topic, Juror No. 8 will lash out and say "stop interrupting me." She tells other people to be quiet. Juror No. 10 described how he was trying to make a point and Juror No. 8 "literally got up as I was speaking and left." Juror No. 10 said that Juror No. 8 came in that morning and said she wasn't going to talk at all, "I'm just going to sit here and listen." Juror No. 10 expressed some frustration because "when someone sits and listens, we are not making any headway . . . because it's this particular individual who's got to make some dialogue with us to work through what it is she doesn't understand or doesn't agree about." Juror No. 10 acknowledged that she "has a right to try and convince all of us of her point of view but she doesn't express a point of view particularly. And she doesn't seem to – she always seems unwilling to vote with us."

Juror No. 11:

Juror No. 11 told the court "[t]he rest of us 11 don't need to deliberate anymore because we came with a decision already and we – there is no use to deliberate with 11 of us when we already made a decision with 11 of us, and she is the only one who won't talk. But we can't deliberate." Juror No. 11 expressed the concern that Juror No. 8 is "constantly changing her decisions . . . we take votes, and she agrees. And then 15 minutes later, [we] take another vote, and she disagrees. And she is constantly bringing up topics that are not part of the facts or . . . part of the case. A lot of rambling on about things that [do] not pertain to the case." He added "anytime somebody challenges or just mentions anything to her, she is a little combative." He complained that the hardest part was making decisions and then five minutes later, Juror No. 8 says she doesn't agree. We tell her that she just told us she agreed. And then they go back and forth repeatedly. He acknowledged that at times Juror No. 8 will say "I'm not going to talk anymore" adding that we can't deliberate if she doesn't talk. He stated that Juror No. 8 is "always mumbling" but "it's not good what she is mumbling. . . . [I]t's almost like . . . she is talking to somebody type of thing." Juror No. 11 also noticed that Juror No. 8 uses a

yellow legal pad, tears out pieces of paper, and takes her notes home with her, adding "everyone saw that."

When brought back in to the courtroom for further questioning, Juror No. 11 acknowledged that he had sent a note to the foreperson earlier that morning asking him to talk to the judge about Juror No. 8 "because of how it was going." Later on during a break, outside the presence of the other jurors, this juror spoke with the foreperson and asked again if "we" can talk with the judge "because it's very difficult in the deliberation room just with her presence in there." Juror No. 11 asked the foreperson to talk with the court because of Juror No. 8's "mannerisms." Juror No. 11, who sits right next to Juror No. 8 in the deliberation room, told the court that Juror No. 8 was mumbling a lot and her comments indicated to him that her mental state "was not all there."

After the court excused Juror No. 8 from the panel, defendant's trial counsel moved to have this juror excused as well. He argued that Juror No. 11 had violated the court's admonition not to discuss the case outside the presence of the other jurors when he urged the foreperson to talk to the court about Juror No. 8. Juror No. 11's comments also reflected a bias against Juror No. 8 in that he perceived her as a hold-out juror and wanted her removed for that improper purpose. The court, after hearing arguments from both counsel, agreed and dismissed Juror No. 11. In so doing, the court expressed its concern about the motivation behind Juror No. 11's actions.

Juror No. 12:

Juror No. 12 commented that Juror No. 8 often says she doesn't want to talk to them. When that happens, Juror No. 8 will shut down for a bit while the other jurors try to have her "open up." Then she'll start to give a speech. When we tell her to get to the point, she gets offended and shuts down again. Juror No. 12 described Juror No. 8 as "very argumentative" and that she did not appear to want to listen to what the other jurors have to say. Juror No. 12 confirmed that Juror No. 8 talks a lot under her breath and makes "kind of inappropriate comments." Juror No. 12 has also seen Juror No. 8 take notes on a yellow pad, put the notes in her laptop bag, and then take them out of the jury room.

Juror No. 8

After more discussion with the parties, court brought Juror No. 8 back into the courtroom for further questioning. When asked about her notes, Juror No. 8 said "I knew you were going ask about that." She gave the following reasons why she took her notes home: "I have gotten to the point where I've been – feel like I've been attacked – not attacked, but I think I know how this – I got to the point where I could hardly think and – I – I can show you what I wrote down, the idea of – I was – I mean, I was having questions – all different questions thrown at me at all different sides, and they would focus on one thing on one moment, and they would go to another thing on another moment, and I got to the point where I could not even focus on anything. And I was trying to raise the idea of – what was it? Oh, God, what was it, legal consent?"

Juror No. 8 told the court that she wrote on the yellow pad because her court notebook was full. "I wrote things down so I could formulate a question because I was so tired at the end . . . I wrote out questions because I could not get them to focus on one aspect. And they kept going from one thing to another . . . I was so exhausted and I'm still so exhausted . . . I think I know probably what's going to happen, but that's okay, that I feel I just couldn't – couldn't even raise a point, and I just felt so frustrated that my mind is so exhausted that I – I had to actually rely, and I couldn't remember all the instructions, and I just – I [s]aid I've got to write – and I wrote down a question –two questions."

Juror No. 8 admitted that she had taken her notes along with other papers out of the jury room, some of which she left at home. Juror No. 8 could not confirm which notes she had taken home with her. "I don't remember if I – I [wrote] them out. [I] don't remember if I wrote them out and took them back. I don't really remember. I can't remember. I don't remember one thing or another. I'm just so tired. And it's okay if you dismiss me."

Juror No. 8 tried to explain the toll the process had taken on her. "I mean I'm not going to have to settle my conscience. That's fine. I think that's what's going to happen. But that's all right, and I – I do understand that. . . . I cannot underestimate the amount of

emotional stress that has been put on me and my mind – I mean there were just – it was so fast. I had seven, eight different people. And every time I tried – I had to rely on writing a note. I couldn't remember everything at one time."

The court asked Juror No. 8 if there were times during the deliberations when she said she wasn't going to talk anymore. Juror No. 8 answered that the foreperson had accused her of failing to deliberate but she disagreed. She thought he was making it difficult for her to deliberate. Juror No. 8 admitted that she mumbled under her breath but said the other jurors did so also. She acknowledged going to the restroom frequently but said that was because she was drinking a lot of water and coffee. She also asked for a lot of breaks because the stress was "so bad" that she had to stand up and walk.

When the court inquired whether Juror No. 8 was willing to talk with the other jurors about the case, she replied: "At this point, I really believe that it's a done deal. I don't think my testimony will make any difference. I don't see it changing. . . . I think the decision has already been made. . . . [T]hey want me off the jury. There is no doubt in my mind. . . . I tried very hard to raise issues of reasonable doubt. . . . [¶] . . . [¶] [W]hen you have 11 people ganging up on you, yes, it is [stressful]. But there is nothing I can do about it. My conscience is clear. *So I'll go*." (Italics added.)

After hearing additional argument from the parties, the court found good cause to excuse Juror No. 8.

C. The Trial Court Properly Found Good Cause to Excuse Juror No. 8.

Defendant contends that the removal of Juror No. 8, a hold-out juror, was done without good cause and violated his Sixth Amendment right to a unanimous jury verdict. Using the "demonstrable reality" standard, and as further set forth below, we are confident that the trial court's decision to dismiss Juror No. 8 for good cause was manifestly supported by evidence on which the court actually relied.

In its detailed oral ruling, the court gave careful thought to and articulated its reasons for dismissing Juror No. 8 including: 1) she repeatedly violated the court's express instructions not to remove her notes from the jury room; 2) she repeatedly shut down and refused to talk and deliberate with other the jurors; 3) she abruptly took breaks,

often in the middle of conversing with the other jurors; 4) she mumbled to herself while others were talking; 5) she did not see a purpose in deliberating further with the other jurors; and 6) sitting on the jury was taking a visible emotional toll on her. The court expressed its reluctance to dismiss a juror in the middle of deliberations but cited a "constellation of issues" as justifying its actions in dismissing Juror No. 8 for good cause.

1. Juror No. 8's Removal of Jury Notes From the Deliberation Room

Throughout the trial, the court gave numerous admonitions to the jury about keeping any jury notes either in the courtroom or in the jury room. At the beginning of the case, the court advised jurors that they would be given notebooks and may take notes during the trial. Jurors were instructed to not remove their notebooks from the courtroom just before opening statements. Right before the closing statements, the jurors were again reminded not to remove their notes from the jury room. The court also advised that after the trial, the juror's notes would be collected and destroyed. Just before going into the jury room to begin deliberations, the court reminded the jury again to "keep your notebooks in there [jury room] when you come out. We lock the jury room, and it remains locked during the entire time of deliberations. . . . When you come out, leave your notebooks in there." At the end of the first full day of deliberations, the court asked the jurors in open court, "did you all leave your notebooks in there?"

The record established that Juror No. 8 repeatedly violated the court's instruction not to remove jury notes from the courtroom. She wrote notes to herself on her own personal legal pad instead of the notebook provided by the court. Several of the other jurors confirmed that Juror No. 8 often took these notes home, describing how she stuffed these pieces of paper into her briefcase and then took the briefcase with her out of the jury room at the end of the day. Juror No. 8 then returned the next day with these notes, to which she referred during deliberations. Juror No. 8 herself admitted to the misconduct, explaining why she felt compelled to take the notes home; she was unable to keep up with the questions posed and comments made by the other jurors. She was not able to maintain her focus when more than one or two people were talking with her. She brought her notes home to help her to frame her thoughts and questions for the next day.

Defendant contends there is no evidence that this juror's use of her notes outside the jury room affected in any way either the other jurors or Juror No. 8's assessment of the evidence; at most her misconduct involved a trivial violation of the court's instruction. Defendant maintains that trivial violations that do not prejudice the parties do not require removal of a sitting juror. (See *People v. Wilson* (2008) 44 Cal.4th 758, 839 [discharged juror was improperly removed from the panel for making a comment to another juror outside the jury room about the defendant; the appellate court found that this was a "trivial" violation of the trial court's instructions not to speak about the case when not with the other deliberating jurors].) Unlike in *Wilson*, Juror No. 8's misconduct here was not trivial and it did have a prejudicial impact on the other jurors. Several of the jurors observed Juror No. 8 taking notes on a separate legal pad and removing her notes from the jury room at the end of the day. Two of the jurors, Juror Nos. 3 and 5, observed Juror No. 8's misconduct in removing notes from the jury room and felt compelled to report her actions to the foreperson. One juror, Juror No. 3, went so far as to confront Juror No. 8 about her removal of notes from the jury room. She told Juror No. 8 it wasn't fair for her to take her notes home, adding that but for the court's instruction "we would all be doing that." Juror No. 8 told Juror No. 3 "she needed to take that – her notepad out for clarification during our discussions." Juror No. 3 reported Juror No. 8's misconduct to the foreperson, Juror No. 7. Later, Juror No. 3's conduct in reporting Juror No. 8's violation of the court's instruction to the foreperson became the subject of a motion to remove her from the panel because this conversation had taken place outside the presence of the other jurors. The court denied the motion.

The court properly exercised its discretion to remove Juror No. 8 for violating the court's admonition not to remove jury notes from the jury room. "In appropriate circumstances a trial judge may conclude, based on a juror's willful failure to follow an instruction, that the juror will not follow other instructions and is therefore unable to perform his or her duty as a juror." (*People v. Ledesma* (2006) 39 Cal.4th 641, 738.) Here it appears that Juror No. 8 felt incapable of deliberating unless she took her notes home with her. She was overwhelmed and unable to concentrate in the deliberation room. She

could not keep up with the questions being asked of her by her fellow jurors. As the jurors switched from one area to another, she found she could not focus. She would abruptly leave and go to the bathroom, staying there for a long time. Juror No. 8 told the court that the deliberation process left her exhausted and very tired; she was frustrated by the feeling of being so tired. She acknowledged that she wasn't supposed to take her notes outside the jury deliberation room but did so anyway. Given her expressed concerns about keeping up with her fellow jurors, it is difficult to see how Juror No. 8 could have followed the court's instruction, to leave her notes in the deliberation room, without feeling at an even greater loss during deliberations. This is more than a trivial violation as it calls into question this juror's ability to deliberate as well as follow the court's instructions.

2. Juror No. 8's Difficulty in Deliberating with Other Jurors

As the court explained in *People v. Cleveland* (2001) 25 Cal.4th 466, 485, "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views." Defendant contends that Juror No. 8 was willing and able to deliberate and indicated that she would do so when questioned by the court. Defendant further contends that although the other jurors found Juror No. 8 difficult to work with they did not perceive her as being unwilling or unable to deliberate. The question here is whether Juror No. 8's conduct and statements revealed an inability or unwillingness to deliberate with the other jurors. " ' "Grounds for investigation or discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists." ' " (*People v. Homick* (2012) 55 Cal.4th 816, 898.)

The court was clearly troubled by the accounts given by the other jurors about Juror No. 8. Juror No. 8 appeared to the other jurors as "overwhelmed" and "very emotional." She was described as "angry" and "confrontational." Juror No. 8 appeared to have difficulty thinking when three or four persons talked with her. Juror No. 8 would agree to a point but then several hours later she had no idea that she agreed to that point

or she would "flip flop." Juror No. 8 often monopolized the conversation and would get mad if people interrupted her. When this happened, Juror No. 8 would "sulk and shut down," "cros[s] her arms," and refuse to take part in the conversation "for hours." Juror No. 8 would say things like "I don't want to talk about it" or interrupt other jurors as they were talking by saying she wasn't going to talk about it anymore. She engaged in "child-like" behavior by often closing her eyes and refusing to make eye contact with whoever was engaging her in a discussion. Juror No. 8 would abruptly take breaks to use the bathroom: this happened with some regularity and in the middle of her conversations with other jurors. She would be gone a fairly long period of time before she returned. She frequently mumbled under her breath while other jurors were talking, making inappropriate comments as if she were talking to someone else. The foreperson reported that several of the jurors thought Juror No. 8 was "fundamentally mentally unstable." She often dominated the conversation but then would complain that the other jurors were not listening to her.

Defendant contends that Juror No. 8 was willing and able to continue deliberating with the other jurors but her actions indicate otherwise. Juror No. 8 initiated the contact with the court. She waited outside the courtroom after a day of deliberation to talk privately with the court. When the court inquired why she wanted to talk with the court, Juror No. 8 described how she was a hold-out juror who was in the minority. She felt out-numbered. Two of the male jurors shut her down whenever she tried to express some analytical thinking. She tried to raise issues of "reasonable doubt" but found it impossible. She felt "ostracized." While Juror No. 8 expressed confidence that she was going to vote her way whether "they like it or not," she was very emotional. When asked if she was willing to keep deliberating with the other jurors, Juror No. 8's response was not an unequivocal yes; instead she said "this is so upsetting." The court had to take a break to allow Juror No. 8 to compose herself, offering her water and Kleenex. When she was asked again whether she would be willing to continue with deliberations and engage with the other jurors, she said she did listen and did engage in the deliberation process.

She again needed time to compose herself before returning to the jury room. Later in the morning, Juror No. 3 observed Juror No. 8 crying outside the courtroom.

When she was questioned by the court the second time, a few hours later, Juror No. 8 appeared to be under even more stress. She described feeling like she was being "attacked" to the point "where she could hardly think." She described being "so exhausted" and "so frustrated that my mind is so exhausted." She told the court, "I cannot underestimate the amount of emotional stress that has been put on me and my mind." She stated, "I'm just so tired." She told the court "[a]nd it's okay if you dismiss me." "I mean I'm not going to have to settle my conscience." When the court commented that this appeared to be a stressful process for Juror No. 8, she stated, "Well, when you have all 11 people ganging up on you, yes, it is. But there is nothing I can do about it. My conscience is clear. *So I'll go*." (Italics added.) Juror No. 8 herself expressed the futility in further deliberating with her fellow jurors suggesting to the court that she did not see a purpose in deliberating any further since "the decision has already been made." The court took note of Juror No. 8's demeanor and commented that "her affect was clearly quite emotional and concerned."

Both trial-related and nontrial-related stress can provide good cause for discharging a juror. (*People v. Diaz* (2002) 95 Cal.App.4th 695, 700 [juror was overwhelmed, felt intimidated by the other jurors, and refused to discuss her opinion after only two hours of deliberation]; *People v. Warren* (1986) 176 Cal.App.3d 324, 326-327 [juror said she was so intimidated by other jurors she was likely to vote with the majority and against her own conscience]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1099-1100 [juror had anxiety about a new job]; *People v. Harrison* (2013) 213 Cal.App.4th 1373, 1383 [among other factors, juror appeared to have been "overwhelmed" by the task of being a juror and was unable to focus on relevant principles and apply the court's instructions to the facts of the case before him].) "The evidence bearing on the question whether a juror has exhibited a disqualifying bias during deliberations may be in conflict. Often the identified juror will deny it and other juror will testify to examples of how he or she has revealed it." (*People v. Barnwell, supra*, 41 Cal.4th at p. 1053 [court must give

deference to the court's factual determinations, based, as they are, on firsthand observations unavailable on appeal].)

The court is entitled to discount a juror's verbal declarations when they conflict with the juror's demeanor. (*People v. Diaz*, *supra*, 95 Cal.App.4th at p. 704; *People v. Beeler* (1995) 9 Cal.4th 953, 989, abrogated on other ground as noted in *People v. Edwards* (2013) 57 Cal.4th 658, 704-705 [recognizing importance of trial court's observation of juror's demeanor in reviewing decision to discharge]; *People v. Lucas* (1995) 12 Cal.4th 415, 489 [although juror stated that the cancellation of her vacation would not affect her ability to deliberate, her behavior and demeanor supplied substantial evidence to the contrary].)

Here, while Juror No. 8 appeared to say words to the effect that she had been deliberating and would continue to do so, her demeanor and responses showed otherwise. She was extremely upset and shut down in the deliberation room whenever the other jurors asked her to articulate her views. While Juror No. 8 also made remarks that she was in the minority, tried to raise the issue of reasonable doubt, was deliberating with the other jurors, and would hold firm to her viewpoint, her demeanor suggested otherwise. As the court and other jurors had noted, Juror No. 8 was very emotional. She was visibly exhausted from the process of deliberation. Her body language and demeanor, i.e. taking frequent breaks, interrupting other jurors, crossing her arms and refusing to talk, and refusing to make eye contact, demonstrated that she did not want to deliberate further with the other jurors. She felt compelled to take her notes home to keep up with the other jurors. Her palpable relief at being excused—"my conscience is clear, so I'll go"—is additional evidence that Juror No. 8 was struggling with the process.

After Juror No. 8 was excused, defense counsel made a motion to excuse Juror No. 11 for cause because this juror spoke with the foreperson about Juror No. 8 outside the presence of the other jurors. After extended discussions with the parties, the court ultimately did excuse Juror No. 11. She did so after finding that Juror No. 11 talked with the foreperson about the case outside the presence of the other jurors, thereby violating the court's instructions not to discuss the case outside the presence of the other

deliberating jurors. The court also found that Juror No. 11's reasons for reporting Juror No. 8 to the court suggested that this juror was trying to have a hold-out juror removed, which was an improper purpose. We point this out only to demonstrate that the court did consider and take into account whether any of the individual jurors might have been complaining about Juror No. 8 because she was a hold-out juror as opposed to expressing their concerns about her ability or unwillingness to deliberate or to follow the court's instructions.

Respondent argues that the better rule is to always send a dissenting juror back in to deliberate further or declare a mistrial, citing Ninth Circuit law to support his contention. (*United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1087 [court must not dismiss juror if the record evidence discloses a "reasonable possibility" that the impetus for a juror's dismissal stems from the juror's views on the merits of the case].) Our Supreme Court has expressly rejected "the standard [set forth] in . . . *Symington,* that precludes dismissal of . . . a juror whenever there is 'any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case.' " (*People v. Cleveland, supra,* 25 Cal.4th at p. 484, quoting *Symington, supra*, at p. 1087.) In any event, as the record establishes to a demonstrable reality, Juror No. 8 was unable to perform her duty as a juror and there was good cause to discharge her. We therefore reject defendant's argument that Juror No. 8 was discharged without good cause because she was a holdout for an acquittal and she had expressed reasonable doubts about the prosecution's evidence.

II. There Was No Abuse of Discretion When the Trial Court Denied Defendant's Motion for a New Trial.

Defendant contends the court erred prejudicially when it denied defendant's motion for a new trial based on newly discovered evidence. He submits that this new evidence ties R. to exculpatory email correspondence in which she recants her testimony that defendant forced her to have sex. This evidence was not available at the time of trial.

He argues that there is substantial evidence, uncontradicted by competent evidence, that this new evidence would have probably altered the outcome of the case. We disagree.

A. Relevant Proceedings

Defendant filed a motion for a new trial alleging that newly discovered evidence showed it was unlikely that anyone other than R. wrote the emails, presented to the court earlier, in which she recanted her testimony that defendant raped her. Defendant alleges that, shortly before the trial began, R. told a person named "Dave Sugar,"[7] in an email exchange, that she lied to police about being raped. Dave had come forward anonymously and provided the emails to the prosecutor and his office.

At trial, the prosecutor advised the court and defense counsel that he had received several emails addressed to both his work and personal email accounts from someone claiming to be "Dave." The prosecutor had also received printed copies of these emails in his office. One of those emails was sent to him at 4:00 a.m., addressed to his personal email account, just hours before he was scheduled to give his opening statement in this case.[8] Dave claimed that he had met a person identified as "[T]oxxxickisses" on a website called "something like sugar daddy for me dot com."[9] "Dave" provided email attachments purporting to show email conversations he had with Toxxxickisses where she told him she had lied about being raped.[10] The email exchanges took place during a short period between June 19 through June 24 of 2013, just before the trial started.

---

[7] During the proceedings, "Dave Sugar" was referred to as "Dave," "Sugar Dave," and "SDXDAVE." His Yahoo account user name was "sugadave." His SD4ME user name was "sdxdave." We shall refer to him as "Dave."

[8] The email was sent to the prosecutor's personal email, which was private and had not been disclosed to any of the witnesses. The case had been pending for seven years.

[9] The website, SugarDaddyForMe.com, promotes itself as a website that has "millions of Sugar Daddies" of various diverse backgrounds, "all looking for love, and sweet Sugarbabies that enjoy dating older men." We shall refer to the website as "SD4ME."

[10] In the transcript, the name "toxxxickisses" is spelled many different ways, including "Toxxxickisses" and "ToxxxicKisses." We shall use "Toxxxickisses" when we refer to the user name that is associated with the SD4ME website.

Although he was ambivalent about getting involved, Dave claimed he felt compelled to report Toxxxickisses to the district attorney's office, the San Francisco Police Department's sex crimes unit, and to this prosecutor because he did not want anyone to be falsely accused of rape. Dave explained that he wished to remain anonymous because he was married with two kids and any exposure of his "sugardaddy relationships" would be devastating to his personal life.

The parties discussed this development with the court. The prosecutor advised the court he had asked his investigator to find subscriber information about the person who sent him the emails; however, a search warrant was needed to get the content of the account and this would take some time. The very next day, the prosecutor received more information from Dave, who reiterated he could not risk revealing his identity and had to remain anonymous. However, Dave understood that if he remained anonymous these messages might be considered frivolous, so he voluntarily gave the prosecutor his login credentials to his SD4ME account including his password. Dave also provided an email log with some of the content that he received on that account including copies of all the emails between Toxxxickisses and himself.[11]

The documents provided to the prosecutor by Dave established that, on the SD4ME website, he had promoted himself as a "sugardaddy" who made between $100,000 to $200,000 a year. Dave described himself as "athletic," of "East Indian" descent, 39 years old, and looking for a "SugarBaby" between the ages of 20 and 26. Toxxxickisses responded to his ad in June of 2013. Dave told Toxxxickisses he would pay her $2,000 a month to be involved in an intimate relationship with him. In response to Dave's question about 2 things she was not proud of or felt really bad about, Toxxxickisses answered, "sneaking out and lying to my granny about hookin up lol." In response to his request that she tell him the worst lie she ever made up to get out of trouble, Toxxickisses stated that she had lied about being raped five years before.

[11] The prosecutor advised the court that he had also learned from R.'s adopted family that, around this time, she was made an offer of $100,000 not to come to court.

Toxxxickisses told him that she didn't even have sex with the guy. Toxxxickisses told Dave it happened five years ago, and she had to "go with the lie" she told her grandmother.

The court held an Evidence Code section 402 hearing to determine whether any of this information could be presented to the jury. At the hearing San Francisco Police Inspector Dave Kamita, a certified forensic computer examiner, testified that he was able to locate the IP address of the person "Dave" who sent emails to the prosecutor's work address. Kamita testified that the email originated from an address registered in Great Britain. Kamita testified that if someone sent an email from San Francisco but wanted it to look like it was sent from Great Britain, they could use a software program which sends the data to a remote location so it looks like the information was sent from that point. He testified that his investigation revealed that the person Dave had used a Yahoo email account and had utilized a software program called "TOR" to re-route his emails in order to remain anonymous.

R. testified at the section 402 hearing. She was 22 years old at the time. R. testified that, about two weeks prior to the hearing, she had received two Samsung Galaxy cellphones in the mail. She had previously posted on her Facebook page that her cellphone was broken. Juan Carlos, someone who said he knew her from high school but who she claimed not to remember, contacted her on Facebook and told her he could send her a new phone. He sent the first one through the mail but later told her to give it back because it didn't have a SIM card, so she did so. She received the second phone in the mail shortly after that. As soon as she got the second phone, she activated and began using it.

R. acknowledged that she knew of the SD4ME website. At one time she and a friend went on it and R. created her profile on the website. However, she testified that she did not use the name Toxxxickisses (or a variation thereof) and her profile was created many years ago when she was just 12 or 13. When asked whether she ever used the name Toxxxickisses, she admitted to using the name on a "vampire freaks website." She was very young when she did that too, around 13 or 14 years old. When asked about the triple

x in Toxxxickisses she said she used that to be "cool" and it had nothing to do with pornography. On cross-examination, R. later admitted to using the name Toxxickisses more recently when she was 19 years old but not since then.

When shown the emails received from Dave, R. denied being the writer of any of the emails from Toxxxickisses. She also testified that she had not been on the SD4ME website recently or at any time in June when the emails were exchanged.[12] Because she was embarrassed, R. had not told anyone else that she was a victim in a rape case.

After the hearing, the court denied defense counsel's request to issue a search warrant for R.'s cellphone or computer. The court denied his request on the grounds that there was insufficient evidence presented that R. was the actual source of the emails sent from the person named Toxxxickisses to Dave.

In his new trial motion and supporting documents, defendant alleges that evidence that was not available at the 2013 trial showed it was unlikely anyone other than R. wrote the exculpatory emails to Dave. Defendant submitted a declaration from Samuel Plainfield, a computer forensics expert who, after conducting a forensic analysis of R.'s accounts, concluded there was a very strong nexus between R. and the username Toxxxickisses. Plainfield found that R.'s VampireFreaks.com account, which she opened on December 22, 2008, had her user name as Toxxxickisses. Someone had opened an account on the SD4ME website just three weeks later also using the name Toxxxickisses. In the new trial motion, defendant stated that Dave used a Yahoo email account to log into the SD4ME website in June of 2013 when the emails were exchanged. However, his investigators were not able to develop any additional identification information for Dave.

At the hearing on the motion, the court assumed, for purposes of the motion, that the defense expert Plainfield would testify in accord with his declaration. In denying defendant's motion for new trial, the court ruled that the evidence proffered by the

[12] Defendant had absconded by this time and his whereabouts were unknown. But later, in support of his motion for a new trial, he submitted a declaration stating that he also did not create and nor did he know of anyone who created on his behalf, the emails between "sugadave" and "toxxickisses."

defense did not establish "such an impact that it has been sufficiently established that the victim in this case is connected to these emails in such a way as to require a new trial and a new jury review these issues in order to be able to assess the impact of her credibility." We agree and shall affirm the court's ruling.

B. Standard of Review

A defendant may seek a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at trial." (§ 1181(8).) A trial court's determination of a motion for a new trial " ' "will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' " (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) "To grant a new trial on the basis of newly discovered evidence, the evidence must make a different result probable on retrial." (*People v. Ochoa* (1998) 19 Cal.4th 353, 473). "We accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." (*People v. Nester* (1997) 16 Cal.4th 561, 582 (plur. opn. of George, C.J.).) Our Supreme Court has identified five factors to consider when ruling on a motion for new trial based on newly discovered evidence: " ' "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." ' " (*Delgado, supra*, at p. 328.)

A new trial on the ground of newly discovered evidence is not granted where the only value of the newly discovered testimony is as impeaching evidence or to contradict a witness of the opposing party. (*People v. Hall* (2010) 187 Cal.App.4th 282, 299.) This rule does not apply where the new evidence does more than merely impeach the main prosecution witness but tends to destroy the testimony of the primary prosecution witness by raising grave doubts about the witness's veracity and credibility. (*People v. Huskins* (1966) 245 Cal.App.2d 859, 862-863.) A reviewing court may affirm the trial court's

decision solely on the unlikeliness of a different result on retrial without addressing the remaining factors. (See *People v. Delgado, supra,* 5 Cal.4th at p. 329, fn. 7.)

C. Plainfield's Declaration

In his Declaration, Plainfield provided the following new information which was allegedly not available to defendant previously. R. had a Comcast account and used an email address of rainbowsreveil@yahoo.com. R. used that same email address for her Yahoo, Sheik Shoes, Facebook, and Twitter accounts. This matched the email address used by Toxxxickisses on the SD4ME website. R.'s cell phone number, confirmed on her Yahoo and Facebook accounts, was also used by Toxxxickisses on the SD4ME website. The registration zip code for the Toxxickisses SD4ME account, 94121, is an area of San Francisco where R. lived with her grandmother. The birthdate listed for Toxxxickisses on the SD4ME account is October, 9, 1990, which is consistent with R.'s trial testimony. At trial, R. admitted she used the username Toxxxickisses on the Vampire Freaks website and that she and a friend had created profiles on the SD4ME website. A chat sent from Toxxickisses to Dave used the same phone number registered to R.'s Facebook account. The IP address used to register the Toxxickisses account is not listed as a proxy and is registered to an East Bay location. R. testified that she lived in the East Bay; her Comcast account has her residence address in Concord, California in the East Bay. A single IP address, which was not a proxy, was used to sign into the SD4ME website with the user name Toxxxickisses. The logins are consistent with the dates and times of the messages exchanged on the SD4ME website between Toxxxickisses and Dave. This established that the chats were not fabricated by the defendant or someone on his behalf and that they did in fact occur on the SD4ME platform.

Plainfield was unable to determine the statistical likelihood that someone could have guessed the password for R.'s SD4ME account but pointed out that the site has certain security features, including the prevention of unlimited password guess attempts exceeding five passwords in succession. Based on this information, Plainfield concluded that it was unlikely that the SD4ME messages sent to "sdxdave" from "toxxickisses" were created by someone other than R.

D. Discussion

Defendant has not shown that a "manifest and unmistakable abuse of discretion" occurred when the trial court denied his new trial motion. Even if we were to assume, as the court did, that Plainfield's posttrial declaration contained newly discovered evidence and that it was not cumulative to other evidence bearing on the factual issue of defendant's guilt, we find it is unlikely Plainfield's testimony, including his forensic analysis, would render a different result probable on retrial.

Defendant contends the court used the wrong legal standard when it denied his motion for a new trial. Rather, a new trial is granted when the newly discovered evidence contradicts the strongest evidence introduced against the defendant. Under this standard, R.'s "recantation" of the claim that she had been raped by defendant would have been material to the verdict and the new trial motion should have been granted. Defendant also argues that the court failed to properly assess the weight of the exculpatory evidence, asserting that the trial court's suspicion that it was fabricated weighed significantly on the decision to deny the motion. The court should also have heard testimony from the expert before ruling on the motion.

We find Plainfield's detailed forensic analysis, which was construed by the court to be uncontradicted, did not significantly contradict or diminish any probative value of other evidence regarding defendant's guilt. While his analysis showed similarities between R.'s known email, social media, and retail internet accounts and the account opened by Toxxxickisses on the SD4M website, this was not conclusive proof that R. was in fact Toxxxickisses or that she herself had communicated with Dave on the SD4M platform using the username Toxxxickisses. As the court noted, the new evidence simply connected R. to certain accounts through her name, telephone and email address, but did not show she was the person who opened "or maintained those accounts." Plainfield acknowledged he was not able to confirm that the IP addresses used by Toxxickisses during those chats with Dave between June 13 and 24 were associated with any known IP addresses for R., including her Comcast email account. At most, all Plainfield could say was that the IP address used to register the Toxxxickisses account was registered with

Comcast and was associated with an East Bay location. This is not conclusive proof that R., whose Comcast account also lists an address in the East Bay, was the user of the Toxxxickisses account.

At the 402 hearing, R. denied being the author of the emails with Dave and testified that she was not on the SD4M website during the time in question. The court found R. to be credible and refused to allow defense counsel to question her without a further showing that "these are real emails from her" that relate to the case. While Plainfield's "new" forensic analysis suggests that R. could be connected to the Toxxxickisses account, this would not contradict the strongest evidence introduced against the defendant at trial, i.e., the testimony of R., which was corroborated by other independent evidence. R. testified that defendant raped her while she was highly intoxicated. Physical evidence introduced at trial showed that she had abrasions on her body consistent with forcible sex. Eyewitness testimony provided by multiple witnesses confirmed that R. was highly intoxicated that evening. The DNA evidence also confirmed that defendant had sexual contact with R. on the night in question. As pointed out by Respondent, the exculpatory statement by Toxxxickisses was also internally inconsistent. In her chat with Dave, Toxxxickisses claims that she never even had sex with "the guy." At trial, the forensic evidence established that defendant's DNA was found on parts of R.'s body, thus contradicting Toxxxickisses' assertion that she never even had sex with this person.

The court properly assessed the credibility and veracity of the purported exculpatory evidence when she voiced her suspicion that the defendant might have been the source of the evidence. In addressing the question of how Dave was able to email his messages to the prosecutor using both his home and personal email addresses just before opening statements, the court pointed out that defendant was out of custody before he absconded from trial and was married to, although separated from, a person who was an assistant district attorney in the same office and who then moved to Seattle. It would also not be difficult for someone to figure out these email addresses given that the email for the prosecutor was the "same flavor" of email addresses for all the other district attorneys

in the office and the prosecutor's personal email address was simply a variation on his name. She noted that the defendant had a 15-year history of working in the computer industry, 10 years at Electronics for Imaging in engineering, management, and product development, and five years at Apple in global product development. She pointed out that the defendant could have had access to R.'s phone, given that R. received a cell phone in the mail, which she activated and used, during this same period of time. These were all reasonable inferences that the court drew from the evidence presented at the hearing. The court did not need to hear testimony from Plainfield to inquire into the facts underlying his conclusion that R. was the likely source of the emails with Dave. The court assumed, for purposes of the hearing, that Plainfield testified consistently with his report which contained the factual basis for his conclusions.

Finally, it is unlikely that the jury would have rendered a different verdict if the court were to allow the newly discovered evidence at a retrial. At trial, R.'s credibility was attacked by defense counsel during his cross-examination of her and in his closing statements; the jury was made aware of the many inconsistencies and false statements made by R. during her testimony. Still, the court and the jury found her to be credible. Even if the exculpatory emails had been admitted, their value would likely be countered by evidence of the suspicious circumstances surrounding how the exculpatory emails were provided by the anonymous Dave just before the opening statements were given, R.'s testimony denying that the exculpatory emails were written by her, and the physical evidence that corroborated her testimony that she had been raped by defendant. The fact that the defendant absconded right after R. began her testimony also made it unlikely that any of this newly discovered evidence would have rendered a different result probable during a retrial.

DISPOSITION

The judgment is affirmed.

_____
LEE, J.*

We concur:

_____
STREETER, J., Acting P.J.

_____
TUCHER, J.

A149670

* Judge of the Superior Court of California, County of San Mateo, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.